(1) Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

ALLAN THAN,

Petitioner,

v.

THE UNIVERSITY OF TEXAS MEDICAL SCHOOL AT HOUSTON; M. DAVID LOW, M.D., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY; MARGARET C. McNEESE, M.D., INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ASSOCIATE PROFESSOR AND DEAN OF STUDENT AFFAIRS,

Respondents.

On Petition For Writ Of Certiorari To The United States District Court For The Southern District Of Texas Houston Division

PETITION FOR WRIT OF CERTIORARI

GEORGE M. KIRK
Attorney of Record for Petitioner
GEORGE M. KIRK & ASSOCIATES, P.C.
10565 Katy Freeway, Suite 450
Houston, Texas 77024
Office: 713-722-7500
Fax: 713-722-9675

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

This petition presents the following questions:

Petitioner has graduated from the University of Texas Health Science Center at Houston medical school but the university refuses to tender his diploma. The university charges that on one occasion he engaged in "suspicious" or "glancing" behavior during an exam. Texas courts found that Petitioner had been denied due process in the initial administrative hearing. A second hearing was ordered and conducted four years after the exam, and the university compounded the due process deficiencies.

I. Does the University of Texas Health Science Center at Houston deprive Petitioner of substantive and procedural due process of law by its continuing refusal to tender to him the medical school diploma he has fully earned, but for single unfounded allegation of scholastic dishonesty?

II. Does the administrative process afforded Petitioner fail to provide procedural due process as required under *Matthews v. Eldridge*, 424 U.S. 319 (1976)?

III. Do the courts below err in avoiding discussion of specific allegations of due process deficiencies by relying, in essence, on the fact that Petitioner was afforded some type of hearing?

IV. Does the evidence upon which Petitioner's expulsion is based constitute substantial evidence, or any evidence, where (a) " . . . no one has testified directly that he or she saw Mr. Than copying specific information"; and, (b) the arithmetic analysis relied upon "do(es) not prove or disprove cheating" (appendix, p. App. 34).

LIST OF PARTIES

1. Petitioner: Allan Than
2. Respondent: The University of Texas Medical School at Houston
3. Respondent: M. David Low, M.D., Individually and in His Official Capacity as President of the University of Texas Medical School at Houston
4. Respondent: Margaret C. McNeese, M.D., Individually and in Her Official Capacity as Associate Professor and Dean of Student Affairs for the University of Texas Medical School at Houston

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari to review the judgment and opinion of the United States District Court for the Southern District of Texas, Houston Division, in its cause No. H-97-3305, rendered on November 30, 1998.

OPINIONS BELOW

The Opinion of the United States Court of Appeals, Fifth Circuit, is reproduced in the appendix to this petition, p. App. 1. The judgment of the United States District Court for the Southern District of Texas, Houston Division is reproduced in the appendix to this petition, p. App. 5. The Memorandum and Order Granting Summary Judgment rendered by the district court is reproduced in the appendix to this petition, pp. App. 6-27. The Final Judgment of the district court dismissing Petitioner's case is reproduced in the appendix, p. App. 5. The Opinion of the Hearing Officer is reproduced in the appendix to this petition, pp. App. 28-35.

STATEMENT OF JURISDICTION

The Opinion of the United States Court of Appeals, Fifth Circuit, was rendered on September 27, 1999. The Final Judgment and the Memorandum and Order were rendered on November 30, 1998. The Opinion of the Hearing Officer was rendered on May 3, 1996. This Petition was timely filed within 90 days of the Opinion of the United States Court of Appeals, Fifth Circuit.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Nature of Case

This case is brought by a medical school graduate who has met or exceeded all requirements for graduation and a medical residency but for an unfounded allegation that he engaged in "suspicious" or "glancing" behavior during one exam in 1991. The allegation was first raised several weeks after the day of the exam and expulsion was ordered. A Texas district court enjoined the action on due process grounds and a Texas court of appeals affirmed the district court's decision. In 1995, the Supreme Court of Texas also affirmed on due process considerations but only ordered a second administrative

hearing. Petitioner asserts the initial due process deficiencies were not cured, or curable, and were, in fact, compounded by a state agency frustrated by the state court rebuke. The federal district court, and the United States Court of Appeals, Fifth Circuit, refuse to reach the specific procedural due process deficiencies identified by Petitioner, finding essential repose in the simple fact that Petitioner was afforded a hearing as ordered by the Supreme Court of Texas. Petitioner filed suit in the federal district court stating claims under 28 U.S.C. § 1331; 28 U.S.C. § 1343(3); 28 U.S.C. § 1343(4); 28 U.S.C. § 1981; 42 U.S.C. § 1983; 42 U.S.C. § 1985; 42 U.S.C. § 1988; the Fourteenth Amendment to the Constitution of the United States; and, Tex. Rev. Civ. Stat. Ann. §§ 261.201 and 552.352 (Vernon 1997).

Facts

Petitioner is a medical school graduate requesting his diploma. On March 12, 1991, Petitioner, then a third year medical student, was charged with copying on a National Board of Medical Examiners (NBME) surgery exam administered almost four weeks earlier, on February 22, 1991. Petitioner denied the charges. On April 4, 1991, Petitioner first received an official notice and charge letter. On April 18, 1991, an administrative hearing was conducted. On April 28, 1991, Petitioner was expelled from medical school.

Petitioner brought an action against the medical school in state court. On May 25, 1991, the 190th Judicial

District Court of Harris County, Texas, issued a temporary restraining order and reinstated Petitioner. Respondents removed the case to federal court. The case was remanded.

The 190th Judicial District Court again granted a temporary injunction reinstating Petitioner. The medical school appealed. The Court of Appeals for the First Supreme Judicial District of Houston, Texas, upheld the order. *University of Texas Med. School v. Than*, 834 S.W.2d 425 (Tex. App. – Houston [1st Dist.] 1992) ("Than I"). Subsequently, the trial court held the school in contempt. *University of Texas Med. School v. Than*, 874 S.W.2d 839 at p. 842 (Tex. App. – Houston [1st Dist.] 1994, aff'd 901 S.W.2d 926 (Tex. 1995)) ("Than II"). The school again appealed.

By May 30, 1992, with the litigation still pending, Petitioner successfully completed all courses required for graduation. However, the school refused to award Petitioner the diploma he has earned. When the school refused to allow Petitioner to participate in the graduation ceremony, the 190th Judicial District Court ordered the school to allow Petitioner's participation. However, the school continues in its refusal to award the diploma. Without his diploma, Petitioner is unable to take the Federal Licensure Examination ("FLEX", now the USMLE), a prerequisite to licensure.

The only evidentiary basis for the expulsion is an allegation of "suspicious (glancing) behavior" during a surgery exam administered February 22, 1991. No one testified directly that he or she saw Petitioner copying

specific information (p. App. 34) and the Petitioner has always denied the unfounded allegation.

The Supreme Court of Texas agreed that Petitioner had been denied due process, and despite the anxiety expressed by the Houston First Court of Appeals in Than II (that "another hearing this late would be constitutionally futile"), remanded for a second hearing. *University of Texas Med. School v. Than*, 901 S.W.2d 926 (Tex. 1995) ("Than III"); and, Than II at pp. 854-855.

The second hearing was conducted on May 3, 1996. A decision issued on June 27, 1996. Petitioner was again expelled from medical school and denied his diploma. With no direct evidence of copying, a purported "statistical analysis" was used to bolster the predetermined result. Petitioner has shown that the "statistical analysis" upon which the decision is grounded (a) ignores the NBME's adopted statistical formulae; (b) is "junk math"; and, (c) admittedly, is no evidence of copying. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993).

No reliable or credible evidence was received to support the charge. Further, Petitioner would show that credible and reliable evidence excluded by the University supports Petitioner's defense against the allegation. Finally, Petitioner would show that, in its rush to judgment, the University violated numerous procedural policies enacted to assure the fairness of its proceedings.

Respondents, refusing to be undone by the courts of Texas, expelled Petitioner a second time from medical school on June 27, 1996. Appellee Low soon thereafter published a large newspaper article on September 22,

1996 in the Houston Chronicle, entitled "Can We Trust Doctors Who Cheat?" claiming vindication for the university and sufficiently identifying Petitioner, thereby causing substantial injury to Petitioner's reputation and standing in the community.

Having successfully completed the entire medical school academic curriculum, having participated in the graduation ceremony, and having been accepted to a medical residency, Petitioner filed suit in federal court seeking an order compelling the University to confer the medical degree and the certificate of completion he has earned. Petitioner asserts that he was deprived of property and liberty under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment when he was expelled from medical school on false allegations of academic dishonesty, including at least the following procedural due process deficiencies:

A. The University failed to make its decision on a preponderance, or the greater weight of the credible evidence as required by Regent's Rule 3.52. The evidence relied upon is no evidence or insufficient evidence to support Petitioner's permanent expulsion from medical school.

B. The University, over Petitioner's objection, violated the mandatory disclosure required by Regent's Rule 3.53(1) when admitting and relying on evidence of Dr. Kelley's undisclosed and surprise testimony.

C. The University failed to apply the correct burden of proof required under Regent's Rule 3.52. It assumes Petitioner's guilt, and shifts the burden to Petitioner to prove a

negative: i.e., that he was "above suspicion" and did not copy. The University concludes *" . . . it is the student's responsibility to conduct himself at all times in a manner that puts him above suspicion"*. This clearly indicates that the University applied an improper and unfair burden of proof. The burden was shifted to Petitioner to prove that he did nothing unusual *before* the school would have to prove he copied. In fact, under this scenario, the University would expel any student who did anything to cause an assistant proctor to be "suspicious." Such a rule violates all notions of due process and fair play.

D. The University, in the absence of any direct evidence, based its decision on an unreliable mathematical summary without tendering the data relied upon to prepare the summary.

E. The University and its expert failed to preserve relevant and material evidence (spoliation), knowing that the evidence was in issue due to Petitioner's denial of the allegations and demand for an administrative hearing in 1991. Petitioner was entitled to the benefit of the equitable presumption that the destroyed evidence would have shown that multiple versions of the test booklet were used, and that the answer sheet data would have vindicated him. *Caparotta v. Entergy Corp.*, 168 F.3d 754 (5th Cir. 1999) (adverse inference mandated when material evidence was "inadvertently incinerated").

F. The University relied on its expert's testimony, knowing it was inappropriate under NBME policy (i.e., to be used for corroborative use only; inappropriate in the absence of reliable direct evidence, etc.) and otherwise unreliable (i.e., due to (1) the small sample available; (2) the spoliation of individual test booklets and test sheets; (3) the fact that multiple versions of the exam were distributed making copying impractical; and, (4) the fact that the applicable NBME statistical formulae was not, and, due to spoliation, could not be used).

G. The University inexplicably excluded sworn rebuttal testimony and expert opinion of Petitioner's expert, Robert R. Hill, Ph.D, without cause and in violation of Petitioner's right to due process.

H. The University excluded and refused to consider important testimony of fact witnesses seated in close proximity to Petitioner during the 1991 exam from Dr. Mark Chassay, Dr. Jeffery Michaelson, and Dr. Travis Allen van Meter, thus denying Petitioner a meaningful opportunity to present a defense.

I. The University refused to consider Petitioner's previous sterling academic record and achievements and the likelihood of Petitioner's prospective accomplishments for mitigation purposes in assessing punishment or in assessing whether Petitioner had any motive to copy.

J. The University cut short Petitioner's attempted re-enactment once it became apparent the University's witnesses could

not read any answers when seated in Petitioner's chair. It refused to reasonably consider photographs and other evidence demonstrating the sheer physical impossibility that one could see and copy answers from Ted Chang's answer sheet when seated in the desk occupied by Petitioner during the exam in question.

K. The University ignored reliable evidence of actual bias where Dr. McNeese (who initially brought and prosecuted charges against Petitioner in 1991, and who was individually the subject of much discussion by the Texas Court of Appeals) referred to Petitioner, during a conversation with a colleague, Dr. Adelaide Hebert, as a "chink". Petitioner is an Asian American citizen of Vietnamese descent, who graduated from the University of Texas with high honors and numerous academic scholarships.

L. The courts below assign no weight to the notice and other due process deficiencies found by Texas courts which encouraged the University to compound such deficiencies in the second hearing to Petitioner's detriment (test booklets destroyed, material witnesses scattered or unavailable, etc.).

Early defects under relevant University policies relate to the issue of notice and the appropriateness of the limited remedy (a second hearing) provided by the Supreme Court of Texas. These early procedural defects are not readily curable in a second hearing. For example, the University:

M. Failed under existing policy, to take the simple action of moving Petitioner to a different seat when copying was suspected;

N. Failed to notify the Chief Proctor immediately of whatever suspicion was held by the clerical assistants working with the Chief Proctor (the Chief Proctor, a tenured medical school professor, has never alleged scholastic dishonesty against the Petitioner); and,

O. Failed to notify Petitioner of any allegations until almost a month after the exam.

Respondents take the position that such defects were cured by the limited remedy so that they are not relevant considerations in the second hearing. Petitioner urges that all due process violations found by the Texas courts are binding, relevant, and necessary to any due process analysis in this case, particularly where they:

1. Raise issues of policy, custom and practice (i.e., a change in seating during a test as opposed to permanent expulsion from medical school on a stale and uncertain allegation);

2. Raise substantial logistical difficulties in Petitioner's ability to respond to the core allegation (i.e., witnesses graduated and disbursed to residency programs, medical practices, etc.); and,

3. Where motive may be in issue (i.e., the "chink" references).[1]

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[1] Expulsion for one-time event in the face of a completely unblemished record is arbitrary and capricious where racial

REASONS FOR GRANTING THE WRIT

By its opinion in this cause, the Fifth Circuit confirms a "one size fits all" approach to due process. Ignoring the several procedural deficiencies raised by Petitioner, the Panel relies upon a formulaic mantra, reciting globally that the Petitioner received "ample" notice of the charges and the evidence.

In so doing, the Panel blithely ossifies the "flexible" analysis required. *Matthews v. Eldridge*, 424 U.S. 319, 335; 96 S.Ct. 893 (1976); *Morrisey v. Brewer*, 408 U.S. 471 (1972); and, *Goldberg v. Kelly*, 379 U.S. 254 (1970). The Fifth Circuit, and apparently the Sixth Circuit, believes the Supreme Court has not provided sufficient guidance in this area.[2]

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considerations tainted deliberations, even though the procedure used was adequate. *United States v. Richardson Indep. Sch. Dist.*, 483 F.Supp. 80 (N.D. Tex. 1979), *aff'd mem.*, 626 F.2d 171 (5th Cir. 1980). On application of the test set forth in *Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252 (1972), the University had the duty to evaluate all of the facts before them to guarantee Petitioner equal protection without being arbitrary or capricious.

[2] See, *Johnson v. Humble Indep. Sch. Dist.*, 799 F.Supp. 43 (S.D. Tex. 1992); denying student a right to confront and cross-examine witnesses against him before being expelled from school for two semesters, citing *Brewer by Dryfus v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 262 (5th Cir. 1985); and, *Newsome v. Batavia Local School Dist.*, 842 F.2d 920, 923 (6th Cir. 1988) (" . . . without the aid of Supreme Court authority directly on point, we are left with resolving the procedural due process issues presented in this appeal under the more general rubric of *Matthews v. Eldridge* . . . ").

The Supreme Court has consistently held that an individual in the position of this litigant is entitled, to a "fair adversary hearing." *Goldberg, supra.* This includes fair notice and other procedural safeguards.

The trial court, and the Fifth Circuit District Court of Appeals, seem committed to avoiding the obligation to reach the procedural issues raised by Petitioner in reliance on the beguiling refrain that Petitioner is only entitled " . . . to some kind of hearing." *Zinermon v. Burch,* 494 U.S. 113 at 127, 110 S.Ct. 975 at 984, 108 L.Ed. 2d 100 (1990); and, *Wolff v. McDonnell,* 418 U.S. 539 (1974).

In so doing, the Fifth Circuit would finesse the Supreme Court's consistent admonition that the hearing is required to be fair. *Zinermon, supra,* citing *Matthews, supra* at p. 335. Clearly, allegations of procedural due process deficiencies are to be analyzed under the *Matthews* test. *Id.,* at p. 332-349.

By any standard, the private interest affected here (a medical school graduate) is clearly substantial and serious (*Goldberg* concerned denial of welfare benefits; *Matthews* concerned denial of Social Security disability benefits); the risk of an erroneous deprivation is so high as to be incalculable on the procedures used (or abused); the probable value of enforcing existent and additional safeguards is clear; and, the government's interest in avoiding such procedural safeguards is virtually non-existent.

The trial court and the Fifth Circuit appear reluctant to apply "this carefully crafted accommodation of conflicting interests, weighed and evaluated in light of what fundamental fairness requires." *Zinermon, supra* at p. 148.

By refusing to analyze the deficiencies raised by Petitioner in the *Matthews* context, the Court reduces the elaborate prior consideration of this controversy by the state court system to an absurdity; approves the overzealous prosecutorial aggressiveness of a state university stung by a bitterly contested Supreme Court of Texas finding that due process had been denied in the first hearing; and affirms a patently unfair second hearing (reluctant to address the realized anxiety of a state court of appeals concerned that the University, at a second hearing, would simply hang this remarkably talented citizen out to dry).

Perhaps a rationale exists for such treatment (the efficient moving of a crowded appellate docket; a perception that such reticence serves a policy of avoiding unwarranted interference into the state's interaction with its citizens; or other conceivable notions).

Nevertheless, the Petitioner would respectfully request that the Court grant this Application for Writ of *Certiorari* and, determine, given the unique circumstances and history of this long fought controversy, whether one or more of the several specific deficiencies cited by Petitioner support his contention that he was denied due process by a state university bent on affording anything but fundamental fairness.

If the deficiencies cited in Petitioner's brief may fairly be characterized by the Fifth Circuit as a "shotgun approach", there can be no reasonable doubt (a) as to who got hit; and, more to the point, (b) that it was the university that pulled the trigger.

In making short shrift of the Petitioner's allegations, the lower courts compound the tragedy of this young man who graduated from medical school, meeting or exceeding every academic requirement, with no other suggestion of impropriety on his sterling academic record.

The Petitioner prays for some reasoned analysis as an alternative to simply being dismissed on the formulaic facade of the opinions issued below.

His expectation, of course, and his continued request, is that Petitioner's alleged deficiencies be found to constitute a denial of due process and that the Court will, at long last, simply order the State to award him the medical school diploma he has earned.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that the Court grant Writ of *Certiorari* to review and reverse the Final Judgment of the United States District Court for the Southern District of Texas, Houston Division, in its cause No. H-97-3305, rendered on November 30, 1998; and, the Opinion of the United States Court of Appeals, Fifth Circuit, was rendered on September 27, 1999.

Respectfully submitted,

GEORGE M. KIRK
Attorney of Record
for Petitioner
GEORGE M. KIRK & ASSOCIATES, P.C.
10565 Katy Freeway, Suite 450
Houston, Texas 77024
Office: 713-722-7500
Fax: 713-722-9675

Allan Than, Appellant,

v.

University of Texas Medical School at Houston; M. David Low, Medical Doctor, Individually and in his Official Capacity as President of the University; Margaret C. McNeese, Medical Doctor, Individually and in her Official Capacity as Associate Professor; Dean of Student Affairs, Appellees.

No. 99-20110 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

188 F.3d 633; 1999 U.S. App. LEXIS 23359

September 27, 1999, Decided

Appeal from the United States District Court for the Southern District of Texas Kenneth M Hoyt, US District Judge

DISPOSITION:

Affirmed.

COUNSEL:

For Allan Than, Plaintiff – Appellant: George M Kirk, Jr., Kirk, Gottesman & Lee, Houston, TX.

For University Of Texas Medical School At Houston, M David Low, Individually and in His Official Capacity as President of the University, Dean Of Students Affairs, Defendants – Appellees: James C Todd, Assistant Attorney General, Office of the Attorney General for the State of Texas, Austin, TX.

For Margaret C McNeese, Medical Doctor, Individually and in Her Official Capacity as Associate Professor, Defendant – Appellee: Eliot P Tucker, Mandell & Wright, Houston, TX. James C Todd, Assistant Attorney General, Office of the Attorney General for the State of Texas, Austin, TX.

JUDGES:

Before POLITZ, DAVIS, and WIENER, Circuit Judges.

OPINION BY:

POLITZ

OPINION:

POLITZ, Circuit Judge:

Allan Than is a former medical student at the University of Texas Health Science Center at Houston. During his third year, two proctors observed him repeatedly looking at another student's paper during a National Board of Medical Examiners' surgery examination. A comparison of their examinations revealed identical answers to 88% of all questions incorrectly answered. After a hearing, Than was expelled for academic dishonesty. He sued in state court, challenging the sufficiency of the hearing. Ultimately, the Texas Supreme Court ruled in his favor, concluding that although Than was afforded "a high level of due process," his rights "were violated by his exclusion from a portion of the evidentiary proceedings."[1] To remedy the deficiency, the Texas Supreme Court ordered a new hearing which resulted in a finding that Than had cheated on the examination. This decision was affirmed by the President of the UT Health Science Center.

Alleging a violation of his federal constitutional due process rights, Than filed the instant action. The trial

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[1] *University of Texas v. Than*, 901 S.W.2d 926, 931-32 (Tex. 1995).

court held that Than's claims against the UT Health Science Center were precluded by the eleventh amendment; his claims against the individual defendants were barred by the doctrine of qualified immunity; and his claims against those defendants in their official capacities could not survive summary judgment under Fed. R. Civ. P. 56(c).

Our review of the record persuades that the trial court committed no reversible error. In so concluding, we rely largely on the trial court's thorough legal analysis. We briefly address, however, the contentions advanced by Than on appeal.

Contrary to Than's insistence, any defects of the first hearing are irrelevant; the Texas Supreme Court specifically held that any such defects would be cured by a second hearing. Our focus on this appeal are the procedural protections afforded Than in the second hearing.

In a shotgun approach Than contends that the second hearing fell below the standard required by due process. As defendants correctly note, his complaint is concerned less with process than with substance. Than received ample notice of the charges and the evidence. The hearing officer, a professor at a different medical school, obviously was knowledgeable. He also was impartial; Than does not suggest otherwise. At the hearing, Than was represented by counsel, who called nine witnesses and introduced more than three score exhibits; cross-examined all adverse witnesses; and made an opening statement and closing argument. The UT Health Science Center offered the testimony of the proctors who had

observed Than during the examination, and the testimony of a former director of testing services for the National Board of Medical Examiners who supported the statistical analysis relied upon by the UT Health Science Center. After considering testimonial and documentary evidence offered by both parties, the hearing officer rendered a well-reasoned and even-handed written opinion which we find supported by substantial evidence. We entertain no doubt that Than suffered no federal due process deprivation.[2] The academic institution made a reasoned judgment after a deliberate process in the sphere in which it is expert.

The appellate issue of qualified immunity is rendered moot by our conclusion that defendants did not violate any of Than's federal due process rights.

The judgment appealed is in all respects AFFIRMED.

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[2] The contours of the federal due process right are fleshed out in *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S. Ct. 893 (1976); *Goss v. Lopez*, 419 U.S. 565, 42 L.Ed.2d 725, 95 S. Ct. 729 (1975); *Jenkins v. Louisiana State Bd. of Educ.*, 506 F.2d 992 (5th Cir. 1975); *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALLAN THAN,	§	
Petitioner	§	
	§	
VS.	§	**C.A.**
THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT HOUSTON; M. DAVID LOW, M.D., IN HIS OFFICIAL CAPACITY; MARGARET C. MCNEESE, M.D., IN HER OFFICIAL CAPACITY,	§	**No.H-97-3305**
Defendants	§	

FINAL JUDGMENT

Pursuant to the Memorandum And Order entered in this case, the Petitioner shall take nothing by his suit. The defendants' motion for summary judgment is granted.

This is a Final Judgment.

Signed this 30th day of November, 1998.

/s/ _____
KENNETH M. HOYT
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALLAN THAN,	§	
Plaintiff	§	
	§	
VS.	§	
THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT HOUSTON; M. DAVID LOW, M.D., IN HIS OFFICIAL CAPACITY; MARGARET C. MCNEESE, M.D., IN HER OFFICIAL CAPACITY,	§	**C.A. NO. H-97-3305**
Defendants	§	

MEMORANDUM AND ORDER
GRANTING SUMMARY JUDGMENT

I. INTRODUCTION

The plaintiff, Allan Than, a former medical student at the University of Texas Health Science Center at Houston (hereinafter "UTHSC"), filed this suit under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 against the defendants claiming a violation of his federal "procedural due process" rights. The plaintiff is suing UTHSC, M. David Low (hereinafter "defendant Low") individually and in his official capacity as President of UTHSC, and Margaret C. McNeese, M.D. (hereinafter "defendant McNeese") individually and in her official capacity as Associate Professor of Pediatrics and Associate Dean for Student Affairs at UTHSC.

Pending before the Court are the parties' cross motions for summary judgment. The Court has jurisdiction pursuant to 28 U.S.C. § 1331; 28 U.S.C. § 1343(3); 28 U.S.C. § 1343(4); 42 U.S.C. § 1981; 42 U.S.C. § 1983; 42 U.S.C. § 1985; 42 U.S.C. § 1988; and under the Fourteenth Amendment to the Constitution of the United States. After considering the motions, responses, and the applicable law, this Court grants the defendant's motion for summary judgment.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The facts of this case are detailed at length in the discussion that follows. Therefore, the Court will begin with only a brief summary of the events giving rise to the present action. The plaintiff is accused of academic dishonesty. While a third year student at UTHSC, the plaintiff was required to take a National Board of Medical Examiner's (NBME) surgery exam on February 22, 1991. Two proctors allegedly observed the plaintiff glancing at the answer sheet of another student seated in front of him during the examination. The proctors then reported their observations to the appropriate university officials.

Subsequently, UTHSC had the NBME conduct a statistical analysis of both students' answers. The comparison showed that out of 26 "joint wrong answers" the plaintiff and the other student answered 23 of them the same. Dr. Kelly, UTHSC's expert, found that the two students chose the same wrong answers to 88% of the questions. Shortly afterwards, the plaintiff was notified of the charges against him and informed that a hearing

would follow. Eventually, a hearing was held on April 18, 1991. The plaintiff was not represented by counsel at the hearing. However, he did present witnesses on his behalf and was allowed to cross-examine the two proctors who reported the incident.

Afterwards, a series of state court proceedings ensued in which the plaintiff challenged the validity of the hearing. He contended that he was denied procedural due process as guaranteed by the Texas Constitution.[1] Finally, the Texas Supreme Court held that the plaintiffs due process rights had been violated and ordered that a new hearing be held to remedy the violation.[2] UTHSC appointed a new hearing officer, Dr. Williams, to conduct the rehearing. The rehearing was held on May 3, 1996. Also, the plaintiff was represented by counsel at the rehearing.

After the second hearing, Dr. Williams recommended that the plaintiff be expelled from medical school for academic dishonesty. Dr. Low, the president of the university, affirmed the decision for expulsion. The plaintiff then filed the present action in this Court complaining that the defendants violated his procedural due process

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[1] The Texas Constitution provides:

> No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the land.

Tex. Const. Art. I, § 19.

[2] See *University of Texas Medical School at Houston v. Than*, 902 S.W.2d 926 (Tex. 1995).

rights as guaranteed by the Fourteenth Amendment of the United States.[3]

III. THE STANDARD OF REVIEW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a mater [sic] of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of "informing the Court of the basis of its motion," and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party meets its burden, the nonmoving party must "go beyond the pleadings" and designate "specific facts" in the record "showing that there is a genuine issue for trial." *Id.* at 324. An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986). A failure on the part of the nonmoving party to offer proof concerning an essential element of its case necessarily renders all other

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[3] The Fourteenth Amendment provides in part:

> No citizen shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

U.S. CONST. Amend. XIV, § 1.

facts immaterial and mandates a finding that no genuine issue of fact exists. *Saunders v. Michelin Tire;* [sic] *Corp.*, 942 F.2d 299, 301 (5th Cir. 1991).

The primary inquiry here is whether the material facts present a sufficient disagreement as to require a trial or whether the facts are sufficiently one-sided that one party should prevail as a matter of law. *Anderson*, 477 U.S. at 247. The substantive law of the case identifies which facts are material. *Id.* at 248. Only disputed facts potentially affecting the outcome of the suit under the substantive law precludes the entry of a summary judgment. *Id.*

IV. CONTENTIONS OF THE PARTIES

The plaintiff filed this suit under 42 U.S.C. § 1983 and the Fourteenth Amendment of the United States Constitution, seeking compensatory and punitive damages, attorney's fees and costs, declaratory, and injunctive relief against the defendants.[4] First, the plaintiff contends that

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[4] 42 U.S.C. § 1983 provides:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § (1994) [sic].

the defendants violated his Fourteenth Amendment rights to "procedural due process". Second, he asserts that the defendants were biased and acted with improper motives in their decision-making. Third, he argues that the evidence was insufficient to support the expulsion.

The defendants contend that: (1) the plaintiffs claims against UTHSC are barred by Eleventh Amendment immunity, (2) defendant Low and defendant McNeese are immune from suit under the doctrine of qualified immunity, (3) the plaintiffs claims based on events prior to the May 1996 rehearing are precluded by res judicata and collateral estoppel, (4) the plaintiffs allegations do not support a valid due process claim, and (5) there was sufficient evidence in the record to support the expulsion.

V. DISCUSSION

A. *Res Judicata*

As a threshold matter, the Court must first consider whether the present action is precluded in whole or in part by res judicata. In the case at bar, the defendants contend that the plaintiff's due process claims with respect to the first administrative hearing held in April of 1991 are precluded by res judicata. *See University of Texas Medical School at Houston v. Than*, 901 S.W.2d 296 (Tex. 1995). In the previous state court suit, the plaintiff contended that UTHSC and other defendants denied him procedural due process in a disciplinary proceeding before expelling him from medical school for allegedly cheated on a surgery examination. *Id.* Guided by federal due process jurisprudence, the Texas Supreme Court noted that the plaintiff was "given a high level of due

process" leading up to the April 1991 hearing and throughout the disciplinary process. The court observed that "the plaintiff was given oral and written notice of the charges against him; was given written notice of evidence to be used against him in the hearing, including a witness list and summaries of their testimony, was afforded the right to counsel or other representation; and was afforded a formal hearing with the opportunity to present evidence and cross examine witnesses." *Id.* 931-32.

Nevertheless, the Texas Supreme Court held that the plaintiffs due course of law rights were violated because the hearing officer and another university official conducted an ex parte inspection of the examination room, despite the plaintiffs request for permission to accompany them. *Id.* at 932. In that case, the court explicitly stated that it did not intend to address the plaintiff's claims of insufficient notice. Further, the court declined to express an opinion on any other aspect of the process afforded to the plaintiff with respect to the April 1991 hearing. *Id.* Instead, the court ordered that a new hearing be held since the ex parte inspection of the examination room violated the plaintiff's due process rights. *Id.* at 933-934. The court reasoned that a new hearing would cure any other complaints that the plaintiff might have. *Id.* at 932.

A federal district court is to apply the preclusion law of the forum state in which it sits; therefore the Court's analysis of the defendants' res judicata defense is governed by Texas preclusion law. *Migra v. Warren City School Dist.*, 465 U.S. 75, 87 (1984). In Texas, "a judgment in an earlier suit precludes a second action by the parties and their privies not only on matters actually litigated, but

also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit."[5] *Getty Oil Co. v. Insurance Co. of North America*, 845 S.W.2d 794, 798 (Tex. 1993); See also, *Flores v. Edinburg Consol., Indep. Sch Dist.*, 741 F.2d 773, 778-779 (5th Cir. 1984) (construing Texas law governing res judicata in the context of a deprivation of rights claim brought under 42 U.S.C.A § 1983).

Applying Texas case law to the present case, the Court concludes that the plaintiffs claims with respect to the first administrative hearing held in April of 1991 are barred by res judicata. As stated before, the Texas Supreme Court entered a final judgment on the plaintiff's procedural due process claims finding that his due process rights were violated with respect to the April 1991 hearing. Consequently, the scope of this Court's review is restricted to the question of whether there are any genuine issues of material fact in dispute in the context of the rehearing held on May 3, 1996.

B. *Collateral Estoppell* [sic]

Next, the defendants contend that the doctrine of collateral estoppel precludes the plaintiff from re-litigating ultimate fact issues relating to the events occurring

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[5] This approach is referred to as the "transactional approach", of res judicata. *Getty Oil Co. v. Ins. Co. of North America*, 845 S.W.2d 794, 798 (Tex. 1992) (citing *Barr v. Resolution Trust Corp.*, S.W. 2d 627 (Tex. 1992)) [sic].

prior to the April 1991 hearing.[6] Under Texas law, the doctrine applies when the defendant can meet a three prong test showing that: (1) the issue has been actually litigated, (2) was essential to the final judgment in a prior suit, and (3) is identical to an issue in the pending action. *Johnson & Higgins of Texas, Inc. v. Denneco Energy, Inc.*, 962 S.W.2d 507, 521 (Tex. 1998); *Getty Oil Co. v. Ins. Co. of North America*, 845 S.W.2d at 801-02. However, the party asserting a collateral estoppel defense is not required to have been a party in the prior lawsuit where the issue was decided. *Dover v. Baker, Brown, Sharmon & Parker*, 859 S.W.2d 441, 449-50 (Tex. App.-Houston [1st Dist.] 1993). It is sufficient that the "party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit." *Id.*

In the previous litigation, the plaintiffs due process claim against the defendants involved two separate fact issues: (1) whether he was given sufficient notice of the charges against him before the hearing held in April 1991, and (2) whether he received a fair and impartial hearing. As previously noted, the Texas Supreme Court's judgment in the prior suit hinged on the finding that the plaintiff did not receive a fair and impartial hearing in April 1991. *See University of Texas Medical School v. Than*, 901 S.W.2d at 933-34. Therefore, the plaintiffs complaints arising out of the defendants conduct during the disciplinary proceeding held in April 1991 are collaterally estopped.

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[6] The doctrine of collateral estoppel bars the re-litigation of ultimate fact issues while res judicata bars the re-litigation of claims.

In contrast, the plaintiffs complaint that he did not receive adequate notice of the charges against him before the April 1991 hearing are not collaterally estopped under the above-mentioned three-prong test. The record clearly shows that the issue was actually litigated, satisfying the first prong of the test for collateral estoppel. The third prong of the test is also met because the plaintiff asserts the identical complaint in the case at bar. However, the second prong of the test is not met because the notice issue was not essential to the Texas Supreme Court's judgment in the previous case. *See Id.*

Nevertheless, the plaintiffs complaints of inadequate notice in regard to the first hearing held in April 1991, although not barred by collateral estoppel, are inconsequential to the disposition of the present case. As previously explained, any notice deficiencies related to the April 1991 hearing were cured by ordering a new hearing. See *Perry v. Sinderman*, 408 U.S. 593, 603 (1972); See, e.g., *Jenkins v. Louisiana State Board of Education*, 506 F.2d 992, 1000-01 (5th Cir. 1975); *French v. Bashful*, 425 F.2d 182 (5th Cir. 1970).

C. *State Agency and Eleventh Amendment Immunity*

The court will now address the question of whether the Eleventh Amendment bars federal jurisdiction over the plaintiff's § 1983 claims against UTHSC. The Eleventh Amendment bars suit by a private individual against a State absent waiver or congressional abrogation of Eleventh Amendment immunity. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66, 69 (1989); *State of Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998). Likewise, a suit against a

state agency or department is barred by the Eleventh Amendment "regardless of the nature of the relief sought." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984). The Fifth Circuit has previously recognized that "UTHSC and its regents sued in their official capacities are 'arms' of the state for purposes of the Eleventh Amendment." *State of Texas v. Walker*, 142 F.3d 813, 820 fn. 10 (5th Cir. 1998); See *United Carolina Bank v. Board of Regents of Stephen F. Austin State University*, 665, F.2d 553, 556-60 (5th Cir. 1982); *Gay v.* [sic] *Student Services v. Texas A&M University*, 737 F.2d 1317, 1333-34 (5th Cir. 1984). In view of the foregoing, the plaintiffs claims against UTHSC are dismissed for lack of subject matter jurisdiction.

D. *State Officials and Eleventh Amendment Immunity*

Also, defendants Low and McNeese argue that the plaintiff's claims against them in their official capacities may not proceed pass the jurisdictional hurdle of the Eleventh Amendment. The Supreme Court has held that state officials acting in their official capacities are not persons for purposes of § 1983 and are therefore immune from liability for damages under that statute. *Will v. Michigan Dept. of State Police*, 491 U.S. at 71. Accordingly, the plaintiffs § 1983 damages claims against defendant McNeese in her official capacity and defendant Low in his official capacity are barred by Eleventh Amendment immunity.

A different standard applies to the plaintiffs § 1983 claims for declaratory and injunctive relief against defendant Low and defendant McNeese in their official capacities. Unlike state agencies, state officials are not protected from suit for prospective relief when their conduct violates federal law. *American Bank and Trust Co. of Opelousas v. Dent*, 982 F.2d 917, 921 (5th Cir. 1993) (citing *Will v. Michigan Dept of State Police*, 491 U.S. at 71, n. 10). See *also Warnock v. Pecos County, Texas*, 88 F.3d 341, 343 (5th Cir. 1996) (citing *Exparte* [sic] *Young*, 209 U.S. 123, 155-56 (1908)); *Ganther v. Ingle*, 75 F.3d 207, 210 (5th Cir. 1996). However, federal courts may not award retroactive relief against state officials when sued in their official capacities for violations of a federal law. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984); *Chiz's Motel v. Mississippi State Tax Com'n*, 750 F.2d 1305, 1308 (1985), *Darlak v. Bobear*, 814 F.2d 1055, 1060-61 (5th Cir. 1987) (citing *Edelman v. Jordan*, 415 U.S. 651, (1974)).

Guided by the principles set forth above, the Court concludes that the Eleventh Amendment bars the plaintiffs claims for declaratory, injunctive and monetary damages that would operate retroactively. Hence, the plaintiff's claim for back pay as compensation for all monetary loses [sic] prior to the present case, and his requests for injunctive and declaratory relief as a result of past violations of the [sic] his due process rights are dismissed for lack of subject matter jurisdiction. See *Chiz's Motel v. Mississippi State Tax Com'n*, 750 F.2d 1305, 1307 (5th Cir.1985). However, the plaintiffs request that this Court enjoin any ongoing violations of his due process rights survives the defendants' Eleventh Amendment immunity defense.

D. [sic] *Absolute Immunity*

Relying on *Moore v. McDonald*,[7] defendant McNeese asserts that she is absolutely immune from suit because her role in the second hearing was limited to that of a witness or, in the alternative, as chief prosecutor. The court disagrees. The plaintiffs accusations against defendant McNeese do not arise from her conduct as a witness or as a prosecutor. Instead, the plaintiffs claims against defendant McNeese arise out of her conduct while acting in an administrative capacity. The plaintiff's pleadings allege that defendant McNeese: (1) failed to give him proper notice of the charges against him, (2) conspired with others to withhold evidence, (3) violated Regents Rules, and (4) used a racial epithet when referring to him in a conversation with another university employee. In light of the factors delineated above, defendant McNeese is not absolutely immune from suit.

E. *Qualified Immunity*

Defendants McNeese and Low argue that they are entitled to qualified immunity from the plaintiffs § 1983 claims brought against them in their individual capacities for alleged violations of his due process rights. Under settled law, government officials performing discretionary functions are shielded from civil liability for damages unless their conduct violates clearly established statutory

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[7] 30 F. 3d 616, 619-620 (5th Cir – 1994) (holding that a police officer who testifies at a pretrial suppression hearing is absolutely immune from suit brought by the accused under § 1983). See *Butz v. Economou*, 438 U.S. 478, 508-11 (1978).

or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The unlawfulness of the action must be apparent to the official in light of pre-existing law at the time the conduct occurred. *Id.* The standard pronounced for qualified immunity is an objective test. See *Id.* at 641. Therefore, evidence of improper motive is of no significance in determining whether state officials sued for damages in their official capacities are immune from suit. *Crawford-El v. Britton* [sic]118 S. Ct. 1584, 1592 (1998).

At the outset this Court must establish whether the standards of procedural due process which apply at a disciplinary proceeding for students at a tax-supported school were clearly established under federal law at the time the alleged violations occurred. After a careful review of Fifth Circuit case law, the Court determines that the law in this area was clearly established at the time the defendants' conduct occurred. *See Dixon v. Alabama State Board of Education*, 294, F.2d 150, 157 ([sic] 1961); and *Jenkins v.Louisiana State Board of Education*, 506 S.W.2d 992 (5th Cir. 1975). *Dixon* is the controlling case setting the standard for the minimum level of procedural due process required before a student is expelled for disciplinary problems. In *Dixon*, several students were expelled from Alabama State College for misconduct. The students complained that they were expelled without adequate notice of the charges against them. The notice of expulsion did not specify the grounds for expulsion, instead it only

notified the students only that they were accused of being involved in "this problem of Alabama State College." *Id.* at 151-152. In that case, the Fifth Circuit held that a taxsupported college must afford a student due process before he is expelled for misbehavior. *Id.* at 158. The court further explained that "due process requires notice and some opportunity for a hearing prior to expulsion for misconduct. The notice should specify the charges and grounds which, if proven, would justify expulsion under the regulation of the board of education" and that "the nature of the hearing should vary depending upon the circumstances of the particular case." *Id.*

In *Dixon*, minimum due process required that the students be given the names of the witnesses against them and an oral or written report of the facts to which each witness would testify. *Id.* at 159. The court noted that when a charge of misconduct is involved, "an opportunity to hear both sides in considerable detail, is best suited to protect the rights of all involved." *Id.* In that case, the minimum standards of due process dictated that the students be given an opportunity to present their side of the story at the hearing through either oral testimony or written affidavits of their witnesses. *Id.* Finally, the court stated that a full dress judicial hearing with the right to crossexamine witnesses was not required. *Id.*

In a case similar to Dixon and more on point to the present case, the Fifth Circuit expounded on the distinction between a college disciplinary proceeding and a criminal trial. See *Jenkins v. Louisiana State Board of Education*, 506 S.W.2d 992 (5th Cir. 1975). The court announced that the minimum standards of due process, in the context of that case, did not require the same level of notice

as that of a criminal trial. *Id.* at 1000. In *Jenkins*, six students were suspended from Grambling College, a Louisiana state-supported school, for their alleged participation in campus disturbances. The students complained that they were denied procedural due process by the College Disciplinary Hearing Board. They contended that they were not given adequate notice of the charges against them because the charges on which they were tried failed to allege the existence of the conspiracy for which they were tried. *Id.* at 999.

Unlike the defendants in *Dixon*, the court held that the students in *Jenkins* had received sufficient notice of the charges against them. *Id.* at 1000-1001. The court observed that (1) prior to the hearing the students were given a letter charging them with the violation of "inciting a riot", (2) the students were given a document at the initial hearing which clearly set forth the type of conduct included in the Board's finding of conspiracy and (3) the students were referred to as leaders, organizers and instigators in that document. Additionally, the record revealed that their counsel was sufficiently prepared to respond to the charges at the hearing and conducted "ardent" crossexamination of the witnesses. *Id.* Thus, the students were sufficiently aware of the conspiracy charges even though they were not described with the precision of a criminal indictment. *Id.* at 1000.

Having determined that the law in this case is clearly established, the court must now determine whether the defendants should have known that their conduct violated the plaintiffs federal procedural due process rights. The plaintiff alleges that defendant McNeese: (1) failed to give him timely notice of the charges against him by

waiting to inform of him of the charges two weeks after the examination took place, (2) failed to give him formal notice of the charges against him until more than six weeks following the examination, (3) denied him the opportunity to conduct a meaningful defense by purposefully and maliciously contriving with Dr. Kelly to conceal evidence against him, (4) referred to him as a "chink" and (5) released confidential information regarding his alleged sexual misconduct.

The plaintiff's claims that defendant McNeese knew or should have known that her conduct would violate federal law are unfounded. In this case, there was no reason for defendant McNeese to doubt that the plaintiff had received notice of the charges against him before the rehearing. The record discloses that on March 12, 1991, the plaintiff received oral notification from defendant McNeese of the charges against him. On April 12, 1991, he received a memorandum disclosing the documents that might be produced at the hearing on the charges of academic dishonesty. In that memorandum, the plaintiff was given the names of his accusers. He was also given the name of the student from whom he allegedly copied during the examination. Five days later, on April 18, 1991, the first administrative hearing was held. On April 28, 1991, the plaintiff received notice from the hearing officer recommending that he be expelled. Approximately one month after the Texas Supreme Court ordered a rehearing, defendant McNeese gave the plaintiff a letter dated July 24, 1995 outlining the charges against the plaintiff and included a list of documents that would possibly be used against him, list of witnesses, and their expected testimony at the rehearing. Based upon this evidence,

defendant McNeese could have reasonably believed that the plaintiff was aware of the charges against him prior to the rehearing held on May 3, 1996.

Next, the plaintiff accuses defendant McNeese of purposefully and maliciously acting in concert with Dr. Kelley, an expert witness, to destroy and withhold information from him, in contravention of Regents' Rules providing for mandatory disclosure.[8] The law is clear that a violation of a university's rules does not necessarily amount to a violation of a constitutional right. *See Levitt v. University of Texas*, 759 F.2d 1224, 1230 (5th Cir. 1985). However, when a university's actions violate its own rules and also in themselves violate due process, there is a constitutional deprivation independent of the rule violations. *Id.*

Here, the plaintiff presents no evidence in support of his allegations that defendant McNeese conspired to withhold information from him. Further, the plaintiff cites no authority for his proposition that under federal law, he was entitled to access all of the defendant's evidence against him before the rehearing. Additionally, the fact that defendant McNeese may have acted purposefully and maliciously has no bearing on the defense of qualified immunity. *See Crawford-El v. Britton*, 118 S.Ct.

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[8] Regents' Rules and Regulations Subsection 3.53(1), Chapter IV, Part One provides:

> Each party shall provide the other party a list of witnesses, a brief summary of the testimony to be given by each, and a copy of the documents to be introduced at the hearing at least three days prior to the hearing.

1584, 1592 (1998). Likewise, even if the evidence unequivocally established that defendant McNeese referred to the plaintiff as a "chink" and that she did in fact release prejudicial information about his sexual behavior to the public, it would not support his allegation that he was not given sufficient notice of the charges against him for purposes of the rehearing. Therefore, the Court finds that defendant McNeese could have reasonably believed that her conduct as an administrator and as a witness would not constitute a violation of federal law. Accordingly, defendant McNeese is entitled to qualified immunity.

As to defendant Low, the plaintiff complains that Low prevented him from obtaining the data from which the statistical analysis presented against him at the hearing was derived and consequently, he was unable to perform an independent analysis in rebuttal. Second, he avers that defendant Low, acting in bad faith, deliberately and maliciously affirmed the expulsion in the absence of reliable evidence to justify his decision. The plaintiff argues further that defendant Low affirmed the hearing officer's decision with pre-determined bias and that defendant Low should have known that his due process rights were violated at the rehearing. Finally, the plaintiff complains that defendant Low damaged his reputation in the community by publishing a newspaper article, "Can We Trust Doctors Who Cheat?" (Houston Chronicle, Sunday, September 22, 1996).

In the case at bar, defendant Low's motive and subjective intent is irrelevant to the defense of qualified immunity. *See Crawford-El v. Britton* at 1592. Moreover, even if the plaintiffs allegations were taken as true, there is no evidence in the record to support his contention that

defendant Low knew or should have known that his conduct would be in violation of federal law. As previously determined, the plaintiff was notified of the charges against him. The transcript of the administrative rehearing reveals that the plaintiff was allowed to present his side of the story. The plaintiff, with the aid of counsel, was permitted to cross-examine witnesses, as well as present both oral testimony and written affidavit of witnesses. In the instant case, there was no reason for defendant Lowe [sic] to question whether his conduct would violate federal procedural due process law. Thus, defendant Low is entitled to qualified immunity. Hence, the Court dismisses the plaintiffs claims against defendant McNeese and defendant Low in their individual capacities.

F. *Plaintiffs due process claims*

The plaintiff's claims for prospective injunctive and declaratory relief against defendant McNeese and defendant Low in their official capacities are all that remain for adjudication. In the case sub judice, the Court's primary concern is whether the plaintiffs due process rights were violated, not whether he actually cheated on the examination. *See Ramirez v. Ahn*, 843 F.2d 864 (5th Cir. 1988). The evidence, as detailed above, confirms that the plaintiff received sufficient notice of the charges against him and an opportunity to be heard in compliance with the minimum standards of federal due process law.

Having determined that no violation of federal procedural due process rights occurred, the next question for consideration is whether there was substantial evidence

before defendant Low to support his decision to expel the plaintiff from medical school. *Ferguson v. Thomas*, 430 F.2d 852, 858 (5th Cir. 1970). On this point, the plaintiff argues that defendant Low's decision was unjustified and a result of pre-determined bias. The transcript of the rehearing shows that two witnesses who were proctors during the exam testified that they saw the plaintiff engaging in suspicious behavior during the examination. They explained that the plaintiff made repeated furtive glances in the direction of a student seated directly in front of him and that it appeared that he was copying that student's answer sheet. Furthermore, UTHSC presented statistical data comparing the plaintiffs exam with that of the other student. The data revealed that the plaintiff and the student whom he is accused of copying had 23 out of 26 "joint wrong answers". Here, there is no evidence that defendant Low's decision was guided by bias, or any other impermissible factor. Instead, a careful review of the record reveals that there was substantial evidence to support defendant Low's decision.

V. CONCLUSION

The plaintiffs claims against UTHSC are precluded by the Eleventh Amendment. Under the doctrine of qualified immunity, all claims against defendant McNeese and defendant Low in their individual capacities are dismissed. The plaintiffs claims for prospective relief against the defendants in their official capacities are dismissed because no material fact issue exists on the merits of his claims. Consequently, this Court dismisses the plaintiffs suit and grants the defendant's motion for summary judgment.

It is so ORDERED.

Signed this 30th day of November, 1998.

/s/ _____
KENNETH M. HOYT
United States District Judge

The University of Texas Health
Sciences Center Houston Medical School &
Allan Than Administrative Re-hearing
May 3, 1996

Opinion of the Hearing Officer:

/s/ _____
Darryl M. Williams, M.D.

This proceeding was held on May 3, 1996 for the purpose of hearing the arguments of both sides in the matter in which Allan Than has been accused by the University of Texas Health Sciences Center School of Medicine of cheating during a subject examination in Surgery administered at the School of Medicine on February 22, 1991. Although the issue of whether or not Mr. Than did cheat during the examination is of fundamental concern in this matter, a number of issues that are corollary to this concern include the following: (1) The reliability and credibility of the assistant proctors who were the chief witnesses during the examination. (2) The appropriateness of procedures used by the university in dealing with the matter. (3) The rigorousness and appropriateness of the statistical analysis performed by the National Board of Medical Examiners. (4) The motives that Mr. Than might or might not have had for cheating. (5) The reliability of the reenactment in determining whether or not cheating could have occurred. This opinion will try to deal with each of these issues in the formulation of a summary decision.

1. The reliability of proctors as witnesses.

Both of the proctor witnesses, Ms. Karen Myers and Ms. Rita Hesse, have testified concerning their actions during

the administration of the examination, the observations that they made during the course of the examination and their subsequent actions including preparation of written statements. It is clear from their testimony that both individuals believe that they observed Mr. Than in the process of copying from the work of another examinee. It also appears that they fully recognized the gravity of making accusations of cheating. They took every step that a reasonable individual might do to reassure herself of the reliability of her observations before taking action. It has been noted that neither of the assistant proctors had had training in proctoring, but it does appear that they had read and were familiar with the proctors' manual that accompanied examination materials. In this nation of standardized examinations, it is unlikely that either individual would have not had previous experiences with the mechanics of standardized examinations. Testimony has been given that the actions of the two assistant proctors was distracting and unusually active. Other examinees stated that they were more used to a situation in which the proctor sat at the front of the classroom and read or graded papers. However, the activities in the examination room that day must have been viewed as unusual by both assistant proctors. There appears to be a broadly based assumption that cheating does not go on during such examinations. It seems likely that if the assumption were otherwise, proctors in similar situations would not preoccupy themselves with reading and grading papers. Thus it seems evident that both witnesses felt that they were observing an unusual circumstance and wished to be as certain as they could be that there was indeed an infraction of the rules.

The assistant proctors have been criticized for not taking more prompt action, but it seems apparent that they were exercising all due caution before taking a serious and potentially career-threatening action.

2. University Procedures

It is true that university policies do not appear to be as tight as they ought to be. It seems evident that during the examination, the main priority of the chief proctor should be the examination itself. The university should make certain in future examinations that the chief proctor is present at all times except for urgent situations. The proctors should all be well versed as to the appropriate steps that should be taken in the event that cheating is suspected. However, these breaks in procedure do not negate the basic issues of the case, namely: was cheating observed and what is the evidence that cheating occurred.

3. NBME Analysis of Test Results

The university has presented evidence from the National Board of Medical Examiners analysis of examination sheets. This analysis was conducted at the request of the University following the proctors' report. The examination appears to have been geared to the level of knowledge of the class as a whole. The great preponderance of questions was answered correctly by all examinees including the two individuals in question. The review of the two individual examinations demonstrates the concordance of incorrect answers on the two sheets is 23 out

of 26. That is, the two individuals gave the same wrong answer 23 out of 26 times and different wrong answers 3 of 26 times. Intuitively, that seems to be a high concordance that is borne out by the statistical analysis carried out by the NBME. There seems little merit to the approach recommended by the petitioner's expert witness that concordance of correct answers should also be studied. The preponderance of questions was answered correctly by a large member [sic] of the students taking the examination. Further, since there is only on correct answer per question, correct answers would only add to the concordance between the two answer sheets. It should also be observed that the petitioner's expert witness criticized the statistical methods applied by the NBME but did not offer adequate alternative analyses or a strong rationale for their use. Moreover, in cross examination, he acknowledged that he had not reviewed the examination and was not aware of the methods of construction of the examination or of validation of test questions. Individuals familiar with the standardized examinations developed by the National Board of Medical Examiners know that examination questions are tested for ambiguity and other features which make a poor test question. This is not the same situation as that described by the petitioners expert witness in which an individual faculty member may devise a multiple choice examination that does not have that same level of validation and testing. In short, the expert witness does not appear to have enough knowledge of the structure of these examinations to comment reliably on the examination or about the appropriateness of statistical analysis. The preponderance of questions were answered correctly by a large

number of the students taking the examination. Further, since there is only one correct answer per question, the correct answers only add to the concordance between the two examination sheets. It should also be pointed out that the NBME has been called upon for many years to conduct similar analysis in similar situations. The board is careful to say that their analysis in this case does not prove or disprove cheating but that there is an extremely low statistical probability that the concordance of the two examination papers occurred by chance alone.

5. Interpretation of Information Obtained from Reenactment

Photographs taken by the petitioner from the vantage point of his seat in the examination indicate that it would not be possible for him to see over the shoulder of the individual sitting in front of him. This is an interesting demonstration, but it is not clear how it can be used as evidence. The human eye is different from a camera lens, and we have no way of exactly reproducing the conditions that existed in the examination room on the day of the incident in question. Testimony has been provided that Mr. Than moved back and forth within his seat. We do not know about the activities of the other student. We really have no way of knowing for certain what Mr. Than could and could not see.

The testimony of other individuals taking the examination is important, but at the time of the examination their job was to complete the examination. It seems unlikely that they would be as cognizant of other activities going on within the examination room as would proctors whose

specific responsibility during the examination was to note any irregularities.

4. The Petitioner's Motives to Cheat

There is little doubt that Mr. Than has had a distinguished academic career. His performance in high school was outstanding and his accomplishments as a promising young scientist were noteworthy. His many awards and commendations are evidence of his high ambition, motivation and talent.

Similarly, Mr. Than had an excellent academic record at the University of Texas in Austin. He continued to receive commendations for his academic accomplishments.

However, we know little about his accomplishments in medical school. He certainly appeared to have a solid performance, although in the increased competitive atmosphere of medical school his accomplishments did not appear to be as unusual as in his earlier academic career.

It is not clear why Mr. Than would feel the need to cheat on the surgery examination. On the other hand we have no evidence of his motivations one way or the other. There are abundant examples of individuals who have no apparent need to perform a dishonest act and yet do so. Mr. Than's academic record is indeed laudable but is not evidence in itself that Mr. Than would not cheat on the surgery examination.

Summary

After reviewing the testimony and evidence presented by both sides in this matter, I must conclude that the weight of evidence indicates that Mr. Than did indeed copy information from the test papers of another student during the surgery examination. Evidence for this is circumstantial and no one has testified directly that he or she saw Mr. Than copying specific information. However, two individuals have reported seeing Mr. Than participate in suspicious behavior that would be compatible with cheating and copying of information. The review of test results by the National Board of Medical Examiners provides strong statistical evidence for a concordance of incorrect answers on the two exams in question which is considerably higher than would be expected by chance only. Taken together, this is strong indirect evidence that Mr. Than had copied answers during the examination.

Mr. Than's previous academic record is not in question but it has little bearing on the question at hand as to whether Mr. Than did or did not cheat during the examination.

Decision

The evidence supports the allegation that Mr. Allan Than is guilty of cheating and that he had copied from the examination paper of another student during the final surgery examination on February 22, 1991. A number of remedies are available according to University of Texas disciplinary procedures. However, it is my belief the appropriate punishment for cheating in a professional

school is dismissal. Thus, it is my decision that Mr. Than be dismissed from the University of Texas Health Sciences Center School of Medicine in Houston. Mr. Than is obviously a bright, highly motivated and accomplished young individual. However, cheating is a serious infraction of professional codes of conduct. In the appropriate academic environment, it should not be the university's responsibility to prevent cheating. It should be understood that it is the student's responsibility to conduct himself at all times in a manner that puts him above suspicion. Mr. Than did not do this and the statistical evidence would support the testimony of eye witnesses.

/s/ _____
Darryl M. Williams, M.D.